Filed 2/10/97

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| OSCAR WILLIAMS et al., Plaintiffs and Appellants, | |
| v. | A073813 |
| WELLS & BENNETT REALTORS et al., Defendants and Respondents. | (Alameda County Super. Ct. No. 732025-9) |

Oscar and Linda Williams appeal from a judgment on the pleadings entered in favor of Wells & Bennett Realtors (Wells) and Al Frankel in appellants' action for breach of contract and fraud in connection with the purchase of a residence. The trial court determined that the two-year statute of limitations of Civil Code section 2079.4 barred all causes of action. We hold that the special statute of limitations does not apply to causes of action for intentional fraud, and reverse.

## BACKGROUND

The allegations of appellants' first amended complaint disclose the following facts. Appellants purchased a residence from Shirley Mims on or about April 20, 1990. Al Frankel, of Wells, was the agent for the seller.[1] At the time Mims authorized Wells to sell the property, there were a number of defects present on the property. Specifically, there was a defective retainer wall on the downhill side of the home, which

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts C and D of the Discussion.

1 Mims is not a party to this appeal.

caused occasional shifting of the earth supporting the concrete slab foundation. The affected portion of the foundation extended from the garage into the family room. Prior to appellants' viewing of the house, Mims toured the property with Frankel and pointed out a large continuing crack in the floor of the garage and family room. Mims told Frankel that the crack was caused by the earth shifting. Mims delivered the keys to Frankel and left for Louisiana. When appellants first viewed the property, the crack in the garage floor had been filled, and the crack in the family room had been completely covered by tile.

Appellants made an offer to purchase the home, which was eventually accepted by Mims. In connection with the sale, Mims and Frankel each executed a disclosure statement, as required by Civil Code sections 1102 and 2079.[2] On Mims' portion of the statement, she checked "yes" to the question regarding her awareness of any significant defects, but checked "no" as to each of the listed possible defects, with the result that no defect was disclosed by Mims. Frankel's portion of the form stated: "no adverse conditions noted other than cosmetic repair." Appellants took title to the home in April of 1990.

Appellants did not discover the defect until an inspection on or about August 18, 1992, revealed major damage to the foundation. The cost of repair was estimated to be over $150,000. On March 15, 1994, appellants filed a complaint against Mims, Wells, Frankel, and appellants' own realtors. That complaint contained three causes of action, and alleged breach of contract, (failure to disclose pursuant to section 1102), fraud, and negligent misrepresentation. On January 2, 1996, Wells and Frankel noticed a motion for judgment on the pleadings, arguing that all causes of action were barred by the statute of limitations set forth in section 2079.4.

At a hearing held on January 22, 1996, the court granted Wells' motion with prejudice as to the third cause of action for negligent misrepresentation. The court

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[2] Unless otherwise indicated, all statutory references are to the Civil Code.

granted the motion without prejudice as to the contract and fraud causes of action, and gave appellants 10 days to amend.

On February 1, 1996, appellants filed a first amended complaint which asserted, in relevant part, three causes of action against Wells and Frankel. Appellants conceded that the original cause of action for negligent misrepresentation was precluded by the two-year statute of limitatations, as determined in *Loken* v. *Century 21-Award Properties* (1995) 36 Cal.App.4th 263. The sixth cause of action, entitled "Fraud -- Deceit -- Civil Code Section 1710(l)" alleged that the disclosure statement represented that there were no adverse conditions on the property. The actual fact was that there was a serious defect in a retaining wall and the foundation, and a large crack ran through the garage into the family room. This cause of action also alleged, on information and belief based on a recent deposition of Mims, that Frankel had deliberately covered over the crack with tile. The seventh cause of action, entitled "Fraud -- Suppression of Fact -- Civil Code Section 1710(3)" alleged that Frankel represented there were no adverse conditions on the property, but suppressed the fact that the house had a serious defect in the retaining wall and foundation which made the house uninhabitable. The eighth cause of action, entitled "Breach of Implied Covenant of Good Faith and Fair Dealing" alleged that a statement disclosing real estate relationships, signed by Frankel, was a part of the contact between appellants and Mims. The complaint further alleged that appellants were third party beneficiaries of the authorization to sell, signed by Frankel and Mims. The failure to disclose and affirmative misrepresentations were alleged to be a breach of the covenant of good faith and fair dealing implied in those contracts.

On or about February 20, 1996, Wells and Frankel filed a second motion for judgment on the pleadings and a motion to strike the first amended complaint. Respondents argued that the complaint was still barred by section 2079.4, because the only duty Frankel owed appellants was the duty to inspect and disclose under section

2079.[3] On March 29, 1996, the court entered its minute order granting respondents' motion, as to all relevant causes of action, stating that the action was barred by sections 2079 and 2079.4, pursuant to *Loken* v. *Century 21-Award Properties, supra,* 36 Cal.App.4th 263. The order further stated that no contract existed between these parties and appellants. Judgment was entered on April 12, 1996, dismissing the action as to Wells and Frankel. Appellants appealed from the judgment.[4]

## DISCUSSION

On appeal, appellants' primary arguments are that the reasoning of the *Loken* decision does not apply in cases of intentional fraud and that the allegations of the amended complaint relate back to the date of filing the original complaint. We find merit in these two arguments, and reverse the court's judgment dismissing Wells and Frankel from the case.

A. Standard of review

"A judgment on the pleadings is governed by the standards governing a judgment following a successful demurrer. (6 Witkin, [Cal. Procedure (3d ed. 1985)] Proceedings Without Trial, § 263, p. 565.) A general demurrer admits the truth of all material facts alleged in the complaint." (*Ramirez* v. *USAA Casualty Ins. Co*. (1991) 234 Cal.App.3d 391, 397.) Thus, on appeal, we assume the truth of the allegations of the complaint. (6 Witkin, *op. cit.*, *supra*, at p. 564.)

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**3** Defendants Realty World Chabot Highland, J. Terrell, and Laurice Jackson also filed a motion for judgment on the pleadings, which was ultimately denied by the trial court.

**4** The final judgment as to the Wells defendants is appealable. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 49, p. 74.) The various minute orders from which appellant purported to appeal are not appealable, and the appeal as to those orders has been dismissed. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 82, pp. 104-105; *Stevens* v. *Key Resistor Corp.* (1960) 186 Cal.App.2d 325.)

B. Application of the Two-Year Statute of Limitations in Section 2079.4

Regarding appellants' sixth and seventh causes of action for fraud, respondents argue that section 2079 sets out a broker's obligation to prospective purchasers of real property, and that breach of any obligation arising from that statute is governed by the two-year limitations period in section 2079.4.[5] Citing a passage from *Loken*, they also argue that the two-year statute applies to actions for fraud, as well as negligence, claiming that a broker's sole duty is to inspect and disclose. According to respondents, no matter what the broker may do to conceal known defects, his only liability is for failure to inspect and disclose, and the two-year statute governs. After reviewing the Legislative history of section 2079, we conclude that the statute of limitations in section 2079.4 was not intended to apply to actions for intentional fraud, and we do not read *Loken* as holding that it does.

Section 2079, added in 1985 and amended in 1994, contained an express statement of Legislative intent. That statement of intent was enacted as section 2079.12 in 1994, and provides, in relevant part, as follows.[6] "(a) The Legislature hereby finds and declares all of the following: . . . [¶] (4) That Section 2079 to 2079.6, inclusive, of

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**5** Section 2079.4 provides "[i]n no event shall the time for commencement of legal action for breach of duty imposed by [section 2079, et seq.] exceed two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first."

**6** The balance of the text of section 2079.12 states: "Legislative findings and declarations
(a) The Legislature hereby finds and declares all of the following:
(1) That the imprecision of terms in the opinion rendered in *Easton* v. *Strassburger*, 152 Cal. App. 3d 90, and the absence of a comprehensive declaration of duties, standards, and exceptions, has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees as to the manner of performing the duty ascribed to them by the court.
(2) That it is necessary to resolve and make precise these issues in an expeditious manner.
(3) That it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public. . . ."

this article should be construed as a definition of the duty of care found to exist by the holding of *Easton* v. *Strassburger*, 152 Cal.App.3d 90, and the manner of its discharge. [¶] (b) It is the intent of the Legislature to codify and make precise the holding of *Easton* v. *Strassburger*, 152 Cal.App.3d 90. It is not the intent of the Legislature to modify or restrict existing duties owed by real estate licensees."

Section 2079 sets out the *Easton* duty as follows: "(a) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer."[7]

Thus, the Legislature made it clear that it was codifying the holding of *Easton*, and had no intention of changing the existing law as it related to real estate brokers and salespeople. In *Easton*, the court noted that existing law required agents to disclose material defects known to the broker, but unknown to the prospective buyer. (*Easton* v. *Strassburger* (1984) 152 Cal.App.3d 90, 99.) A failure to disclose such facts gave rise to a cause of action for fraudulent concealment. (*Ibid.*) The liability of the agent in *Easton* was grounded on negligence, rather than fraud, and the court concerned itself with the issue of whether the agent had a duty to conduct an inspection to discover defects. (*Id.* at p. 99.) The court found that the dual policies of ensuring that a buyer receives accurate information and of protecting a buyer from unethical brokers would

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**7** In 1994, the Legislature added subdivision (b) to section 2079, which referenced the other statutory duties of brokers and salespeople, as follows: "(b) It is the duty of a real estate broker or salesperson licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code to comply with this section and any regulations imposing standards of professional conduct adopted pursuant to Section 10080 of the Business and Professions Code with reference to Sections 10176 and 10177 of the Business and Professions Code."

not be served by allowing the broker to be "shielded by his ignorance of that which he holds himself out to know." (*Id.* at pp. 99-100.) The court, therefore, held that the duties of a seller's broker included "the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." (*Id.* at p. 102.) The court distinguished prior cases, which involved fraud, and stated that in a case based on negligence, the plaintiff need not prove that the broker had actual knowledge of the defect or that the facts were accessible only to the broker or seller. (*Id.* at p. 103.) This review of *Easton* makes it clear that a real estate agent's liability for fraud existed prior to the *Easton* case, and that the new duty imposed by *Easton* did not change the preexisting law of fraud.

The *Loken* case arose after the Legislature codified the holding of *Easton* in section 2079. The buyer in *Loken* viewed the property with his agent, and was assured that cracks in the stucco exterior were normal. After his offer had been accepted, the buyer received a disclosure statement from the seller which represented that the only significant defect was cracking in the cement driveway. Seller's agent also signed the statement, representing that he made a reasonably diligent inspection, and found no other defects. Escrow closed on December 7, 1987. In January of 1990, the buyer discovered cracking in the walls. When he removed the wall-to-wall carpeting in a lower level room, he found a major crack in the cement slab of the house. Evidence of carpet glue in the crack indicated that the crack existed when the carpet was installed. (*Loken* v. *Century 21-Award Properties*, *supra*, 36 Cal.App.4th at p. 267.) On March 28, 1990, the buyer filed an action against various individuals, and seller's real estate brokerage and agent. The court of appeal reversed a trial court's judgment in the buyer's favor, finding that the action was time-barred. (*Id.* at p. 266.)

The *Loken* court determined that the duty imposed by section 2079 was the two-fold duty of conducting a visual inspection, and of disclosing the facts that such an inspection would reveal. (36 Cal.App.4th at p. 271.) The court stated that the first part of the duty embodied principles of negligence, but that the disclosure part of the duty implicated both negligence and negligent misrepresentation. (*Ibid*.) The *Loken* court ultimately concluded that the two-year statute of limitations in section 2079.4 barred causes of action for negligent misrepresentation, despite the fact that the law views that tort as “a species of fraud or deceit.” (36 Cal.App.4th at pp. 268, 272.) The citations supporting the court’s statement regarding “a species of fraud” note that negligent misrepresentation occurs when the defendant makes false statements, honestly believing them to be true, but has no reasonable ground for that belief. Thus, the citations relate the tort primarily to principles of negligence. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 720, p. 819.) The *Loken* court’s discussion does not implicate intentional torts or actual fraud, which are subject to different rules of pleading and proof. (See, e.g., Prosser and Keeton, The Law of Torts (1984) § 107, pp. 740-742, [noting that misrepresentation may be separated into three types: intentional, negligent, and strict liability]; and 2 Harper, James & Gray, The Law of Torts (1986) § 7.6, pp. 405-406, [noting that the basis for liability in misrepresentation by those in the business of providing information is negligence].) Although respondents base their arguments on the *Loken* court’s general statements regarding fraud, we discern no support in that decision for an extension of the statute of limitations in section 2079.4 to govern actions based on intentional fraud.

The *Loken* court also analyzed the legislative intent underlying section 2079, and noted that there was a concern for facilitating the issuance of liability insurance for real estate licensees. (36 Cal.App.4th at p. 272.) The court referenced Insurance Code section 11589.5, which prohibits insurers from excluding coverage for liability arising from breach of the statutory duty under section 2079, but allows exclusion of coverage for liability premised on dishonest, fraudulent, criminal, or malicious acts.[8] Because the

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**8** “No insurer who provides professional liability insurance for persons licensed under the provisions of Part 1 (commencing with Section 10000) of Division 4 of the insurance code provisions were part of the same legislation, the court implicitly conceded that fraudulent or criminal acts were not within the intended scope of section 2079. (36 Cal.App.4th at p. 272.) The *Loken* court determined that despite the fact that the plaintiff had labeled his cause of action as one for negligent misrepresentation, which may have had its roots in fraud, the wrongful conduct alleged in that case stemmed from the statutory duty to inspect and disclose imposed by section 2079. (36 Cal.App.4th at p. 272.)

The key to the holding in *Loken* is the court's statement that even though a cause of action is labeled as negligent misrepresentation, if it is derived from the statutory duty to inspect and disclose, it is subject to the two-year limitation.[9] The evidence in *Loken* was that the broker looked at the foundation and could not recall seeing any cracks. He did no further inspection, and denied making any representations about the house. (*Loken* v. *Century 21-Award Properties*, *supra*, 36 Cal.App.4th 263, 268.) When the court viewed the property, it observed a significant crack in the slab, numerous cracks in the exterior walls, receding cement steps and a crack in the concrete under the sliding glass door to the patio. There was photographic evidence that an iron bar was being used to support the patio door at the time of the purchase. (*Id.* at p. 268.)

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Business and Professions Code shall exclude from coverage under that policy liability arising from the breach of the duty of the licensee arising under Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code. Notwithstanding the foregoing, an insurer may exclude coverage against liability arising out of a dishonest, fraudulent, criminal, or malicious act, error, or omission committed by, at the direction of, or with the knowledge of the insured. [¶] For the purposes of this section, 'professional liability insurance' means insurance against liability for damages caused by any act or omission of a real estate licensee in rendering professional services in this state." (Ins. Code § 11589.5.)

**9** Appellants' original third cause of action came within the *Loken* rule, as it alleged that the defendants made representations regarding the condition of the foundation without making a reasonably diligent inspection and without having reasonable grounds to believe the representations were true. This cause of action sounded only in negligence and arose directly from the statutory duty to inspect and disclose.

The buyer stated that the broker told him that the house was structurally sound, with no problems. (*Id.* at p. 266.) These facts indicate that the broker's inspection was, at least, negligent, and that there was a failure to disclose what a diligent inspection would have revealed. There were no facts indicating that the broker (as opposed to the seller) had engaged in intentionally fraudulent acts. The *Loken* court's discussion of the insurance exclusion for fraudulent or criminal acts further indicates that the court did not intend to extend the limitations period of section 2079.4 to acts of overt fraud or to acts that would be criminal. The essence of the negligent misrepresentation cause of action in *Loken* was the negligent acts of the broker, and not acts of intentional fraud in covering up a blatant defect. Our conclusion that *Loken* has no application to intentional fraud is supported by the express Legislative reference in section 2079 which establishes that the only duty added by that section is the *Easton* duty to inspect and disclose.[10]

C. The Application of the Doctrine of Relation Back

In examining the allegations of appellants' amended complaint, it is clear that the basis of the complaint is that the broker intentionally concealed a known defect in the home and proceeded to fraudulently represent that there were no defects. This is not a cause of action that is derived from the statutory duty to inspect and disclose, but a pre-*Easton* claim for fraud. As such, it is governed by Code of Civil Procedure section 338, subdivision (d), which provides for a three-year limitation period for actions for fraud or mistake. The statute contains a tolling provision which states: "[t]he cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."[11] Respondents argue that

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**10** *Easton* involved liability only for negligence, as the causes of action for fraud and intentional misrepresentation had been dismissed. (*Easton* v. *Strassburger, supra,* 152 Cal.App.3d 90, 97.)

**11** Because of the absence of such a tolling provision in section 2079.4, we decline appellants' invitation to imply a discovery rule of accrual to the special statute. The Legislature has expressly provided that "[i]n no event" shall the limitations period exceed two years from the precisely defined triggering events of close of escrow, date of recordation or date of occupancy. (§ 2079.4.)

appellants' action is barred even under the statute of limitations for fraud because the allegations of the amended complaint do not relate back to the time of filing of the original complaint.

The complaint and amended complaint alleged that appellants discovered the defect on August 18, 1992. The original complaint was filed on March 15, 1994, and the amended complaint on February 1, 1996.[12] Respondents argue that the facts in the amended complaint regarding Frankel's covering of the crack with tile do not relate back to the facts of the original complaint, which renders the complaint time barred even under the fraud statute of limitations. Because the amended complaint included a new party in the caption of the complaint, respondents rely on cases regarding the addition of new parties to support their claim that the amended complaint does not relate back.

We note initially that the amended complaint merely names Barry Bennett in the caption and preliminary allegations as the principal broker for Wells & Bennett. There are no charging allegations against this party, and appellants agreed to drop his name from the action below if the court determined that this addition rendered the complaint defective.[13] The general rule regarding relation back, as stated by our Supreme Court, is as follows. "An amended complaint relates back to the original complaint, and thus avoids the statute of limitations . . . if it: (1) rests on the same general set of facts as the original complaint; and (2) refers to the same accident and same injuries as the original complaint. [Citation.]" (*Barrington* v. *A.H. Robins Co*. (1985) 39 Cal.3d 146, 151.) *Barrington* provides an example of an amendment that did not relate back, where

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**12** Code of Civil Procedure section 338, subdivision (d) provides that the three-year statute of limitations accrues on the date that the aggrieved party discovers the facts constituting fraud. In the instant case, the complaint establishes that date as August 18, 1992.

**13** Appellants argue that it was error to dismiss Bennett from the action. We have not been provided with any order that dismisses Bennett, and appellants are free to attempt to join him in the action on remand.

plaintiffs first alleged injury caused by ingesting a prescription drug and medical malpractice. The amended complaint joined a new defendant and alleged the injury of tubal-ovarian abscesses caused by a defective Dalkon Shield. (*Id.* at pp. 151-152.) "California courts have shown a liberal attitude toward allowing amendment of pleadings to avoid the harsh results imposed by statutes of limitations. [Citation.] Thus, proper amendments to an original complaint 'relate back' to the date of the filing of the original complaint, despite the amendments being made after the statute of limitations has expired. [Citation.]" (*Garrison* v. *Board of Directors* (1995) 36 Cal.App.4th 1670, 1677-1678.) When an amended complaint contains the same basic facts as the original complaint, the purpose of statutes of limitations is served because the defendants receive sufficient notice of the need to defend against the claim. (36 Cal.App.4th at p. 1678.)

The relation-back doctrine applies in the instant case. Appellants' first amended complaint alleges the same basic set of facts as the original complaint. Thus, Wells and Frankel were given notice that appellants claimed that there were undisclosed defects in the house purchased from Mims and that defendants made false representations about the foundational defects and problems caused by earth shifting under the house. The changes effected by the amended complaint were to clarify the intentional nature of the alleged torts.

D. Breach of Contract Cause of Action

Appellants' eighth cause of action, captioned "Breach of Implied Covenant of Good Faith and Fair Dealing" alleges the existence of a contract between Wells, Frankel, and appellants, based on the document entitled "Disclosure Regarding Real Estate Relationships." The complaint also alleged that appellants were third party beneficiaries to the exclusive listing agreement between Wells and Mims. On appeal, appellants raise three theories to support the contractual cause of action: (1) the agency disclosure document referred to in the complaint; (2) the real estate disclosure statement; and (3) the contract between Mims and Wells, based on a third party beneficiary theory.

Respondents correctly note that the real estate agency disclosure statement is neither a part of the purchase contract nor a separate contract. (*Brasier* v. *Sparks* (1993) 17 Cal.App.4th 1756, 1760.) The disclosure document itself expressly states that it is not intended to be part of any contract between the buyer and the seller. Regarding the real estate relationships disclosure statement, it is merely the form of document required by section 2079.14 (formerly section 2374). Appellants' signature on the document serves to acknowledge receipt of a copy of the disclosure statement. Frankel's signature, similarly acknowledges receipt of a copy of the confirmation that Wells was acting solely as the seller's agent. Appellants urge us to apply the doctrine of incorporation by reference to find that the agency disclosure statement is a part of their contract with Mims. There is, however, no reference to this document in the purchase contract, nor is there a reference to appellant's purchase contract in the agency statement. This document does not support the claim that there was a contract between Wells and appellants.

Appellants contend that the purchase agreement contains an explicit reference to the transfer disclosure document required by section 1102 et seq. The precise language of the purchase contract is: "[u]nless exempt, Transferor (Seller), shall comply with Civil Code §§ 1102 et seq., by providing Transferee (Buyer) with a Real Estate Transfer Disclosure Statement . . . ." Appellants argue that this statement incorporates the transfer disclosure statement by reference and creates a contractual relationship between the seller's broker and the buyer. "Under California law, parties may validly incorporate by reference into their contract the terms of another document. The reference to the incorporated document must be . . . clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties. [Citations.]" (*Baker* v. *Aubry* (1989) 216 Cal.App.3d 1259, 1264 [italics and internal punctuation omitted.)

The terms of the original contract provide that it is the entire and exclusive agreement between the parties, and that no extrinsic evidence may be introduced regarding the agreement. Amendments to the document were required to be in writing, and executed by the buyer and the seller. All subsequent amendments expressly reference the original contract, and state that the new document is incorporated into that contract. The disclosure statement upon which appellant relies contains no such language, and is not signed by appellants.[14] Like the agency disclosure form, this form does not establish a contractual relationship between a buyer and the agent of a seller.

Appellants' final argument regarding their contractual cause of action is that they are intended third party beneficiaries of the exclusive authorization to sell entered into between Mims and Wells. Appellants' theory suffers from a basic misconception of the role of third party beneficiary theory in contract law. "The prevailing American rule permits a third party beneficiary under a contract to enforce it. [Citation.] The rule is codified in Civil Code section 1559, which provides: 'A contract, made expressly for the benefit of a third person, may be enforced by him [or her] at any time before the parties thereto rescind it.' The promise in such a situation is treated as having been made directly to the third party. [Citation.]" (*Outdoor Services, Inc.* v. *Pabagold, Inc.* (1986) 185 Cal.App.3d 676, 681.) The problem with appellants' theory is that even if they were deemed to be intended third party beneficiaries of the exclusive listing agreement between Wells and Mims, they are not attempting to enforce any part of that contract. (See, e.g. *Chan* v. *Tsang* (1991) 1 Cal.App.4th 1578 [broker can enforce, as third party beneficiary, real estate purchase contract specifying payment of broker's commission].) The instant document provides only that Wells will attempt to sell the

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**14** The form is signed by Mims and Frankel, with a space for the buyer to acknowledge receipt. Appellants contend that former section 2375 (repealed in 1995 and currently located at section 2079.16) provides that the listing agent owes a duty of good faith and fair dealing to a buyer. This statutory declaration of a duty, however, does not create a contract between the buyer and the seller's agent, and has no bearing on appellants' contract cause of action.

property and will receive a commission if successful. Appellants' theory seems to be that the covenant of good faith and fair dealing implied in the listing contract now extends to them and provides a tort cause of action for failing to disclose the defect.[15] Even if the Supreme Court had not essentially foreclosed the assertion of tort theories based on breaches of contract in *Freeman & Mills, Inc.* v. *Belcher Oil Co.* (1995) 11 Cal.4th 85, this theory essentially duplicates appellants' tort claims, and does not establish a contract cause of action. There was no error in the ruling as to appellants' contract cause of action.

## CONCLUSION

The judgment dismissing the complaint as to Wells and Frankel is reversed and the matter is remanded for further proceedings in accordance with this opinion. Costs are awarded to appellants.

Dossee, J.

We concur:

Strankman, P.J.

Swager, J.

**15** Appellants argue that a reference in the listing agreement obligates Mims to provide a disclosure statement, but this adds nothing to appellants' attempt to establish a contractual right against Wells.

**Trial Court:** Alameda County Superior Court

**Trial Judge:** The Honorable Sandra Margulies

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*Williams* v. *Wells & Bennett Realtors*, A073813